FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

KATHERINE M. HENDON, Administrator of the Estate of Martha Mayberry, Deceased,
Petitioner,

v.

E.I. DUPONT DE NEMOURS AND COMPANY and JAKE FULLER,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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60 pp

QUESTIONS PRESENTED

1. May an ERISA plan beneficiary waive rights to plan benefits in an appropriately worded marital dissolution agreement and divorce decree, notwithstanding the fact that the plan participant failed to follow plan documents in changing the beneficiary prior to the plan participant's death which occurred forty-one (41) days after the plan participant and plan beneficiary divorced?

2. Was the language in the divorce decree in this case, which incorporated the marital dissolution agreement, sufficient to constitute a qualified domestic relations order (QDRO) designating the decedent (now decedent's estate) as alternate payee of the benefits?

PARTIES TO THE PROCEEDING

The parties to the proceeding are the Petitioner, Katherine M. Hendon, Administrator of the Estate of Martha Mayberry, deceased, who appeared as Plaintiff-Appellant in the Sixth Circuit proceeding and the Respondents, E. I. DuPont Nemours and Company and Jake Fuller, who appeared as Defendants-Appellees in the Sixth Circuit proceeding.

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OPINIONS BELOW

The order of the United States Court of Appeals of the Sixth Circuit affirming the District Court's dismissal of petitioner's cause of action is unreported and is reproduced in the petitioner's Appendix C at 28a. The order of the United States Court of Appeals for the Sixth Circuit denying petitioner's petition for rehearing *en banc* is reproduced in petitioner's Appendix D at 41a.

JURISDICTION

The judgment of the Court of Appeals was entered on April 13,1998. (Appx. C at 28a). Petitioner filed a timely petition for rehearing *en banc* which was denied by the Court of Appeals on May 22, 1998. (Appx. D at 41a). This Court has jurisdiction under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Facts

This case involves a claim by the Petitioner, Hendon, as administrator of a decedent's estate against the decedent's former spouse, Fuller, and the decedent's former employer, Dupont, over approximately $169,000 of benefits earned by the decedent and payable at her death. Although the former spouse, Fuller, had been designated as the beneficiary of these benefits on plan documents, the decedent and Fuller were divorced some 41 days prior to decedent's death.

In the marital dissolution agreement and divorce decree, Fuller specifically waived all of his rights and claims in and to these benefits, and the benefits were awarded to the decedent. However, before any change of beneficiary was made on the plan documents, the decedent died. The

administrator of the decedent's estate notified the employer, Dupont, of the estate's claim to the benefits and provided Dupont with a copy of the marital dissolution agreement and divorce decree. Notwithstanding notice of the estate's claim, however, Dupont paid out the benefits to Fuller, the former spouse.

District Court Proceedings Below

Hendon's state cause of action against the respondents in the trial court was one for (a) breach of contract; and (b) conversion. (Appx. A at 1a). The case was removed to the United States District Court pursuant to 28 U.S.C. §1446 where petitioner's causes of action against both respondents were dismissed on summary judgment. (Appx. B at 18a). The District Court held that petitioner's claim was preempted by the Employee Income Retirement Security Act (ERISA), and that the specific waiver by the former spouse Fuller in the marital dissolution agreement and divorce decree was not sufficient to divest Fuller of his interest in the benefits. (Appx. B at 18a).

Court of Appeals Proceedings

Hendon appealed the dismissal of her claim to the Sixth Circuit Court of Appeals. However, the Sixth Circuit upheld the District Court and found that Hendon's cause of action was preempted by ERISA and that Fuller had not effectively waived his interest in the plan benefits because the plan documents were never followed in changing the beneficiary. (Appx. C at 28a). Although the Court of Appeals recognized that a majority of the circuits that have addressed the issue have ruled that ERISA plan benefits may be waived in a properly worded marital dissolution agreement, the Sixth Circuit held that it follows a different

rule and rejected Hendon's claim that Fuller effectively waived his rights to the benefits. (Appx. C at 28a).

Hendon filed a petition for rehearing with suggestion for rehearing *en banc*. The petition to rehear addressed only the wavier argument and also suggested that the language in the marital dissolution agreement constituted a QDRO, in addition to a waiver. The petition for rehearing was denied by the Court of Appeals. (Appx. D at 41a).

REASONS FOR GRANTING THE WRIT

I. There is a split of authority among the circuits over whether a non-participant beneficiary of an ERISA plan may waive his rights to plan benefits through a properly worded marital dissolution agreement incorporated into a divorce decree. Most of the circuits that have addressed this issue have held that through a properly worded marital dissolution agreement a non-participant beneficiary may waive his rights in plan benefits even though the plan participant failed to follow plan documents in changing the beneficiary. Estate of Altobelli v. IBM, 77 F.3d 78 (4th Cir. 1996); Brandon v. Travelers Ins. Co., 18 F.3d 1321 (5th Cir. 1994), cert. den. 130 L.Ed.2d 635, 115 S.Ct. 732 (1995); Fox Valley & Vic. Cons't. Wkrs. Pension Fund v. Brown, 897 F.2d 275, 279-280 (7th Cir. 1990), cert. den. 498 U.S. 820, 111 S.Ct. 67, 112 L.Ed.2d 41 (1990); Mohamed v. Kerr, 53 F.3d 911 (8th Cir. 1995), cert. den. 516 U.S. 868, 116 S.Ct. 185; Metropolitan Life Ins. Co. v. Hanslip, 939 F.2d 904 (10th Cir. 1991).

However, the Sixth Circuit follows a different rule, and contrary to the majority, holds that even specific waiver language in a marital dissolution agreement and divorce decree is not sufficient to divest the non-participant of benefits because it does not meet the requirements of ERISA in determining beneficiaries. Metropolitan Life Ins. Co. v. Marsh, 119 F.3d 415 (6th Cir. 1997); Metropolitan Life Ins. Co. vs. Pressley, 82 F.3d 126 (6th Cir. 1996) cert. den. 138 L.Ed.2d 193, 117 S.Ct. 2431; McMillan vs. Parrot, 913 F.2d 310 (6th Cir. 1990). This case presents the Supreme Court an opportunity to establish a clear and unequivocal rule of law governing the disposition of ERISA benefits upon the death of a plan participant where the plan participant and beneficiary were divorced and where the beneficiary had

expressly waived all of his rights in the benefits through a carefully and specifically worded marital dissolution agreement and divorce decree.

The seminal case upholding the validity of such waivers and followed by a majority of the circuits that have addressed the issue is Fox Valley & Vic. Cons't. Wkrs. Pension Fund vs. Brown, supra. The Seventh Circuit in Fox Valley held that ERISA allows beneficiaries to waive their interests in plan benefits and concluded that a proper waiver of benefits by a non-participant is not preempted by ERISA's anti-alienation provision. 897 F.2d at 279, 280. The Fox Valley court further found that ERISA is silent on the issue of what constitutes a proper waiver and that federal common law interpreting ERISA gave little guidance on the issue. Id., at 280. The Seventh Circuit also noted that a spouse's waiver of benefits through specific language in a divorce settlement agreement is binding against the fund when it becomes known to the fund before benefits are paid. Id., at 281, 282.

The rationale and holding in Fox Valley has been followed by a majority of the other circuits that have addressed this issue. See, Estate of Altobelli, supra; Mohamed vs. Kerr, supra; Brandon vs. Travelers Ins. Co., supra; Metropolitan Life Ins. Co. vs. Hanslip; supra. Because many employers, including Dupont, have national business locations in many, if not all, of the circuits in this country, the existing state of the law allows for drastically different results under the same set of facts. For example, if the decedent and the parties to this case had been located across the state line into Arkansas instead of Tennessee, the Eighth Circuit precedent articulated in Mohamed, supra, would have required Dupont to honor the estate's claim for benefits.

Moreover, the minority rule created and followed by the Sixth Circuit allows a former spouse who is a non-participant to reap a windfall upon the death of the plan participant, even though the non-participant bargained away and waived his interest in the benefits in a divorce proceeding. The short 41 day period between the divorce and the decedent's death in the case at bar highlights the gross inequity in the results of this minority rule, and underlines the importance of having this issue resolved by the Supreme Court.

As a subpart of this issue, if ERISA preemption does not apply to situations where a party to a divorce proceeding has voluntarily and contractually waived his rights to ERISA plan benefits, then the waiver issue need not be addressed. Moreover, the District Court (Appx. B at 18a) and the Court of Appeals (Appx C. at 28a) both found that Hendon's state law claims were pre-empted by ERISA. Hendon submits that while there are various Court of Appeals opinions applying ERISA preemption in situations such as the case at bar, the Supreme Court has not been called upon to decide this specific issue.

The finding of preemption by the Court of Appeals was premised on general preemption language in this Court's prior opinion of Shaw v. Delta Air Line, Inc., 463 U.S. 85, 77 L.Ed.2d 490, 103 S.Ct. 2890 (1983) and its progeny. However, those cases were not factually similar to the case sub judice.

Moreover, this Court has demonstrated a reluctance to extend the application of federal preemption under ERISA in the recent cases of N.Y. Conference of Blue Cross v. Travelers Ins., 115 S.Ct. 1671, 514 U.S. 645, 131 L.Ed.2d 695 (1995); Cal. Labor Stds. Enforcement v. Dillingham

Cons't., 519 U.S. 316, 136 L.Ed.2d 791, 117 S.Ct. 832 (1997); and DeBuono v. NYSA-ILA Medical and Clinical Services, 117 S.Ct. 1747, 138 L.Ed.2d 21 (1997). In these recent cases this Court recognized and reaffirmed the underlying principle that ERISA'S "relates to" language was not intended to modify the starting presumption that Congress does not intend to supplant state law. Travelers, 514 U.S. at 654, 115 S.Ct. at 1676; DeBuono, 117 S.Ct. at 1751. This Court further observed "that our prior attempt[s] to construe the phrase 'relate to' d[o] not give us much help drawing the line here." Travelers, 514 U.S. at 656, 115 S.Ct. at 1677; DeBuono, 117 S.Ct. at 1751.

Thus, the proponents of ERISA preemption bear "the considerable burden of overcoming 'the starting presumption that Congress does not intend to supplant state law.'" Travelers, 514 U.S. at 654, 115 S.Ct. 1676; DeBuono, 117 S.Ct. at 1752. Hendon respectfully submits that the state law upon which Hendon's cause of action was based fits squarely within what this Court has called "one of 'myriad state laws' of general applicability that impose some burden on the administration of ERISA plans but nevertheless do not 'relate to' them within the meaning of the governing statute." See Travelers, 514 U.S. at 668, 115 S.Ct. at 1683; Dillingham Constr., 117 S.Ct. at 841-842; DeBuono, 117 S.Ct. at 1752.

Hendon is not unmindful of this Court's decision in Boggs v. Boggs, 117 S.Ct. 1754, 138 L.Ed.2d 45 (1997) holding that ERISA preempts community property law which allowed a nonparticipant spouse to transfer by testamentary instrument an interest in undistributed plan benefits. This Court in Boggs observed that preemption was required because the state law at issue conflicted with ERISA or operated to frustrate its objects. 117 S.Ct. 1760, 1761. However, Hendon respectfully submits that the state law upon

which her claim is based does not conflict with ERISA, nor does it frustrate its objects under the facts of this case. Moreover, ERISA allows beneficiaries to waive their interests in benefits. See, e.g., 29 U.S.C. §1055(c)(1)(A)(i) (spouse may waive interest in joint and survivor form of benefit at any time).

Furthermore, the dispute in Boggs was between nonparticipant/nonbeneficiary interests (a claim by sons of a deceased spouse through a testamentary document) and a beneficiary (a surviving spouse of the plan participant). In the case at bar, however, the claims are by the representative of the deceased plan participant in opposition to the claim of a divorced spouse who waived his rights in the plan benefits through a carefully worded marital dissolution agreement and divorce decree. The Supreme Court has not been presented with an opportunity to determine the applicability of ERISA preemption in a case such as this. This issue is of paramount importance and should be settled by this Court.

II. Irrespective of whether the language in the marital dissolution agreement in this case constitutes a valid waiver, the language of the marital dissolution agreement substantially complies with ERISA and thereby qualifies as a qualified domestic relations order (QDRO). In denying Hendon's claim of waiver of benefits, the Sixth Circuit relied in part on the case of Metropolitan Life Ins. Co. vs. Marsh, supra, 119 F.3d 415. However, Marsh upheld similar provisions in a divorce decree as constituting a QDRO. Id., at 417, 422. Thus, the Sixth Circuit in rejecting Hendon's petition for rehearing has refused to follow its own precedent.

CONCLUSION

For the reasons set forth herein, the Supreme Court's

standards for granting certiorari set forth in Supreme Court Rule 10(a) are met. Therefore, petitioner respectfully submits that this petition should be granted.

Respectfully submitted,

LAW OFFICE OF STEPHEN T. GREER, P.C.
STEPHEN T. GREER, BPR #2422
P.O. Box 758
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423-949-3621

BY:/s/_____
Stephen T. Greer, Attorney for Petitioner

Date: August 14, 1998

APPENDIX

APPENDIX A

FILED
November 13, 1995

IN THE CHANCERY COURT OF
HAMILTON COUNTY, TENNESSEE

KATHERINE M. HENDON, Administrator of the Estate of Martha Mayberry, Deceased, PLAINTIFF,	) No. 951172) PART _____
vs.	) JURY DEMAND
E.I. DU PONT DE NEMOURS AND COMPANY and JAKE FULLER, DEFENDANTS.	)

COMPLAINT

Comes the Plaintiff, and for her cause of action against the Defendant, would show to the Court as follows:

1. Plaintiff is and was at all times material herein a resident of Hamilton County, Tennessee, and is the duly appointed and acting administrator of the estate of Martha Mayberry, deceased. The administration of this estate is now pending in the Chancery Court of Hamilton County, Tennessee. Plaintiff brings this action in her capacity as

administrator of the estate of Martha Mayberry, deceased.

2. The Defendant, E.I. Du Pont De Nemours and Company, (hereafter "Dupont") is a foreign corporation, but is authorized to do business in the State of Tennessee, and at all times material herein was doing business in Hamilton County, Tennessee.

3. The Defendant, Jake Fuller, (hereafter "Fuller") is and was at all times material herein a resident of Hamilton County, Tennessee.

4. The decedent, Martha Mayberry, died intestate on the 17th day of July, 1994, while a resident of Hamilton County, Tennessee. The decedent had been previously married to the Defendant, Jake Fuller, but that marriage ended in divorce on the 6th day of June, 1994. A copy of the divorce decree whereby the parties were divorced on that date is attached hereto as Exhibit "A" and made a part hereof by reference.

5. At the date of the death of the decedent, Martha Mayberry, she was an employee of Dupont and was the owner of certain personal assets acquired through Dupont, including, but not limited to the following:

A. Dupont Group Life Insurance with a value of approximately $59,000;

B. Dupont Savings Plan with a value of approximately $106,300; and

C. TRASOP shares with a value of approximately

$3,847.50.

At the date of the death of said decedent, the above described assets were in the possession and control of the defendant, Dupont, which was holding said assets for the decedent.

6. Subsequent to the date of the death of said decedent, the Plaintiff was appointed administrator of the decedent's estate by order of the Probate Court of Hamilton County, Tennessee. In her capacity as administrator, Plaintiff had the duty and authority to collect all of the assets belonging to said decedent for the purpose of administering the same in accordance with law. The assets of the decedent described in Paragraph 5 above were assets that should have been distributed and/or paid to the Plaintiff as administrator of the decedent's estate. Notwithstanding the right of the decedent's estate to said funds and assets, the Defendant, Dupont, unlawfully paid over said funds and assets to the Defendant, Jake Fuller. Said payment was made over the protest and objection of the Plaintiff.

Prior to the transfer of said funds and assets to the Defendant, Fuller, Plaintiff made known to both Defendants that it would be inappropriate and improper to transfer said funds and assets to the Defendant, Fuller, especially in light of the terms and provisions of the divorce decree between the decedent and the Defendant, Fuller, a copy of said divorce decree being attached hereto and marked as Exhibit "A". A copy of said Divorce Decree was provided to Dupont prior to the time that it paid out these assets to the Defendant, Fuller.

7. The terms and provisions of the divorce decree between the decedent and the Defendant, Fuller, clearly

provided that the assets of the decedent described in Paragraph 5 above, were awarded to the decedent, and all right, title and interest of the Defendant, Fuller, in and to said assets were divested from him. Said decree not only awarded these assets to the decedent, but also constituted a contractual obligation between those parties, which contractual obligation the Defendant, Dupont, was made fully aware prior to the disposition of said funds and assets.

8. The actions and conduct of the Defendant, Dupont, in transferring said funds and assets to the Defendant, Fuller, constitute a breach of the contractual obligations owed to the decedent and constitute conversion of decedent's assets. The actions and conduct of the Defendant, Fuller, in taking possession and control of said assets also constitutes a breach of the contractual arrangement between said Defendant and the decedent, and also constitutes conversion of these assets.

9. Since the transfer of said assets to the Defendant, Fuller, the Plaintiff is unaware of the location of such funds and assets and is unaware of whether or not the same are safe and secure and subject to disposition pursuant to orders of this Court. Furthermore, Plaintiff fears and believes that unless a temporary restraining order is issued immediately restraining and prohibiting the Defendant, Fuller, from disposing of, concealing and/or otherwise alienating said funds and assets pending the outcome of this litigation, that the Plaintiff, as well as all next of kin of the decedent, may suffer irreparable harm and damage.

PREMISES CONSIDERED, PLAINTIFF PRAYS:

1. That process issue and be served upon the Defendants, requiring them to answer the allegations contained herein, but that their oath be expressly waived.

2. That upon the filing of this Complaint a temporary restraining order issue restraining and prohibiting the defendant, Fuller, from disposing of, concealing, and otherwise alienating said funds and assets pending the final determination of this matter in this Court.

3. That a show cause order issue requiring the Defendant, Fuller, to appear before this Court and show cause why such funds and assets in his possession should not be paid into the registry of this Court to be held in an interest bearing account pending the outcome of this matter.

4. That upon the hearing of this cause that the Court declare and decree the rights of the parties in and to said funds and assets.

5. That upon the hearing of this matter that all of the assets described herein be declared and decreed to be the assets of and property belonging to the decedent's estate and that said Defendants be required to pay to and/or deliver to the Plaintiff all of said funds and assets, and that Plaintiff be awarded a monetary judgment therefor against the Defendants, jointly and severally.

6. That Plaintiff also be awarded prejudgment interest on all of the funds and assets to which she is entitled.

7. That Plaintiff be awarded attorney fees and her reasonable litigation expenses for the filing and prosecution of

this cause of action.

8. That this cause and all issues joined herein be tried before a jury.

9. Grant to the Plaintiff such other and further general relief to which she may be entitled.

This is the 13th day of November, 1995.

THIS IS THE FIRST APPLICATION FOR EXTRAORDINARY PROCESS IN THIS CAUSE

PLAINTIFF

/s/_____
KATHERINE M. HENDON

STEPHEN T. GREER, P.C.
P.O. Box 758
Dunlap, TN 37327
(615) 949-3621

BY: /s/_____
Stephen T. Greer, B.P.R. #2422
Attorney for Plaintiff

STATE OF TENNESSEE)
COUNTY OF HAMILTON)

I, KATHERINE M. HENDON, Plaintiff in the foregoing action, make oath that the statements contained in the foregoing Complaint are true and correct to the best of my

knowledge, information and belief.

/s/_____
KATHERINE M. HENDON

Sworn to and subscribed before me,
this the 13th day of November, 1995.

/s/_____
Stephen T. Greer
NOTARY PUBLIC
My Commission Expires: 3/28/99

COST BOND

We, the undersigned, do hereby acknowledge ourselves as sureties for the cost of this cause.

STEPHEN T. GREER, P.C.

BY: /s/_____

Complaint, No. 951172

EXHIBIT "A"

FILED
June 6, 1994
JUDITH P. MEDEARIS, CLERK

MARTHA MAYBERRY FULLER	: DOCKET NO. 94-DR-0492
	: CIRCUIT COURT
VERSUS	: HAMILTON COUNTY
	: TENNESSEE
JAKE E. FULLER	: DIVISION III

FINAL JUDGMENT

This cause came on to be further and finally heard on June 6, 1994, before the Honorable William M. Barker, Judge of the Circuit Court of Hamilton County, Tennessee, upon the complaint filed by plaintiff, the answer and counter-complaint filed by defendant and the answer thereto, the testimony of witnesses heard in open Court, and the entire record of this cause.

After the parties stipulated that both parties have grounds for divorce as provided in T.C.A. 36-4-1290(a), the Court finds the parties should be declared divorced under the provisions of T.C.A. 36-4-192(b).

The Court affirmatively finds that the parties have

made adequate and sufficient provision by written agreement for the equitable settlement of any property rights between the parties. A copy of said agreement is attached hereto and marked Exhibit I.

It is hereby ORDERED and ADJUDGED that:

1. The parties are hereby declared to be divorced and both parties are restored to all the rights and privileges of unmarried persons.

2. Plaintiff's maiden name, Martha Mayberry, is restored to her.

3. The Court approves and adopts the marital dissolution agreement heretofore entered into between the parties which is incorporated into this judgment.

4. All costs, including litigation tax, are adjudged one-half (½) against each of the parties, for which execution shall issue if necessary.

ENTERED this the 6th day of June, 1994.

/s/_____
William M. Barker, Judge

APPROVED FOR ENTRY:

PATY, RYMER & ULIN, P.C.

BY:/s/_____
Selma Cash Paty

Complaint, No. 951172

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/s/_____
Martha Mayberry Fuller
PLAINTIFF

/s/_____
Jake E. Fuller
DEFENDANT

Complaint, No. 951172

"EXHIBIT I"

MARITAL DISSOLUTION AGREEMENT

This Agreement made this 31st day of May, 1994, at Chattanooga, Tennessee, between MARTHA MAYBERRY FULLER, hereinafter referred to as WIFE, and JAKE E. FULLER, hereinafter referred to as HUSBAND.

WHEREAS, the parties hereto were married on June 5, 1984, and differences have developed between the parties; and

WHEREAS, WIFE has filed a divorce on the grounds of inappropriate marital conduct and irreconcilable differences in the Circuit Court of Hamilton County, Tennessee, Docket Number 94-DR-0492 and HUSBAND filed a counter-complaint on the same grounds; and

WHEREAS, both parties desire to enter an agreement for settlement of their property rights and the allocation of debts incurred during the marriage.

Now, therefore, in consideration of the premises and the mutual covenants and agreements hereinafter contained, the parties do mutually agree as follows:

1. The parties may and shall at all times hereafter live apart. Each shall be free from interference, authority or control, whether direct or indirect by the other, as fully as if he or she were single and unmarried. Each may reside at such place or places as he or she may elect.

The parties each agree that the provisions of this Marital Dissolution Agreement will govern their actions during the period of their separation and before the entry of a divorce decree, and each agree that the other may rely upon the provisions of this Agreement and be relieved of any statutory or common law obligation which each may owe to the other under the marriage laws of this or any other jurisdiction.

2. WIFE is awarded the following property:

1) All of the furniture and personal belongings she owned prior to the marriage;

2) The freezer in HUSBAND's possession that was owned by WIFE prior to marriage;

3) The dining room table, 8 chairs, China cabinet, 25 inch TV, end tables and coffee table purchased during the marriage and in WIFE's possession;

4) 1982 Lincoln Mark IV she owned prior to marriage;

5) 1989 Buick Riviera;

6) 1994 Lexus

7) All of her DuPont pension and retirement benefits;

8) Her DuPont Stock and Thrift Plan and SIP

Plan;

9) All other accounts in her sole name;

10) Her jewelry and clothes.

All right, title and interest HUSBAND has in said property shall be divested out of him and vested solely in WIFE.

3. HUSBAND is awarded the following property;

1) All of the furniture and personal belongings he owned prior to the marriage;

2) The 45 inch TV, washer and dryer purchased during the marriage and in HUSBAND'S possession;

3) 1986 GMC truck;

4) 4 Wheeler;

5) His retirement benefits at Dillard Smith Construction;

6) All other accounts in his sole name;

7) Guns and scopes;

8) Cattle;

9) Tractor;

10) His jewelry and clothes.

All right, title and interest WIFE has in said property shall be divested out of her and vested solely in HUSBAND.

4. Wife is awarded the real estate owned by her prior to marriage located at 11135 Dayton Pike, Soddy, Tennessee and lake property on Cooper Road, Sale Creek, Tennessee and all right, title and interest HUSBAND has in said property shall be divested out of HUSBAND and vested solely in WIFE. A more particular description of said property is attached hereto and marked Exhibit II.

5. HUSBAND is awarded the real estate owned by him prior to marriage located at 15425 May Road, Sale Creek, Tennessee and whatever interest he has in Fuller Lane and Back Valley Road, which he inherited, and all right, title and interest WIFE has in said property shall be divested out of WIFE and vested solely in HUSBAND. A more particular description of said property is attached hereto and marked Exhibit III.

6. HUSBAND agrees that he will supervise the repairs to WIFE's property at 11135 Dayton Pike, Soddy, Tennessee without charge, but WIFE will pay for all materials used and labor. HUSBAND will not incur any liabilities for labor or materials without WIFE's prior consent.

7. WIFE shall pay the balances due Proffitts, her Master Card and her account at DuPont Credit Union and shall hold HUSBAND harmless from any liability thereon.

8. HUSBAND shall pay all debts in his sole name

and shall hold WIFE harmless from any liability thereon.

9. Each of the parties shall pay for one-half (½) of the damages adjudged in favor of Express Rental, Inc. against WIFE in case No. 94-CV-625 in the Circuit Court of Hamilton County, Tennessee, and shall hold the other harmless from any liability thereon.

10. Each of the parties shall pay their own respective attorney's fees.

11. Each of the parties shall pay one-half (½) of all court costs for the divorce.

12. The parties shall execute and deliver all documents necessary to effectuate the property division set forth herein. In the event either of the parties shall fail or refuse to execute the instrument of transfer, then the Clerk shall do so on motion of the other party.

13. Except as expressly provided in this Agreement, each party shall be fully released by the other from any obligation for alimony, support, maintenance, attorney's fees, court costs, and each party accepts the provisions herein in full satisfaction of all property rights and all obligations for support or otherwise arising out of the marital relationship of the parties. Each party, except with respect to payments accruing hereunder, hereby releases the other party and assigns from any claim of any kind, and specifically relinquishes any right, title or interest in or to any earnings, accumulations, future investments, money or property of the other party.

14. Each of the parties acknowledges that a full disclosure of all assets and liabilities have been made to the other and that there are no debts on the real estate transferred or for which the other spouse will be liable that is not expressly assumed herein.

WITNESS our hands the date above written.

/s/_____
MARTHA MAYBERRY FULLER

/s/_____
JAKE E. FULLER

STATE OF TENNESSEE :
COUNTY OF HAMILTON :

On this the 31st day of May, 1994, before me personally appeared MARTHA MAYBERRY FULLER, who executed the foregoing instrument and acknowledged that she executed the same as her free act and deed.

WITNESS my hand and notarial seal.

/s/_____
Alison E. Bench, Notary Public

My Commission Expires:

3/5/97

STATE OF TENNESSEE :

Complaint, No. 951172

COUNTY OF HAMILTON :

On this the 19th day of May, 1994, before me personally appeared JAKE E. FULLER, who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed.

WITNESS my hand and notarial seal.

/s/_____
Clarence E. Stalker, Notary Public

My Commission Expires:

June 5, 1994

APPENDIX B

FILED
August 13, 1996
CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at CHATTANOOGA

KATHERINE M. HENDON, Administrator of the Estate of Martha Mayberry, Deceased, Plaintiff,	) No. 1:95-CV-485
v.	) Judge Curtis L. Collier
E.I. DU PONT DE NEMOURS AND COMPANY and JAKE FULLER, Defendants.	)

MEMORANDUM

The Court has before it a Motion to Dismiss brought by defendant E.I. Du Pont de Nemours and Company ("Du Pont") (Court File No. 2), as well as a Motion to Dismiss brought by defendant Jake Fuller (Court File No. 10). These motions were raised by the defendants pursuant to Rule 12(b)(6) of the *Federal Rules of Civil Procedure*. In these motions, the defendants assert plaintiff Katherine Hendon's

action for breach of contract and conversion should be dismissed for failure to state claims under which relief may be granted.

This action was initially brought by Ms. Hendon in the Chancery Court of Hamilton County, Tennessee. However, pursuant to the provisions of 28 U.S.C. § 1446(d), the case was removed to this Court.

For the reasons set forth hereinafter, the Court will **DISMISS** the plaintiff's action.

I. FACTUAL ALLEGATIONS

Martha Mayberry was an employee of Du Pont. As an employee of the company, she acquired certain assets, including Du Pont Group Life Insurance in the amount of $59,000, a Du Pont Savings Plan worth $106,300, and TRASOP shares at a value of $3,847.50. With respect to each of these plans, Du Pont required Ms. Mayberry to designate a beneficiary of the assets in the case of her death. Thus, Martha Mayberry designated her husband, Jake Fuller.

However, on June 6, 1994, Ms. Mayberry's marriage to defendant Fuller ended in divorce, and as a result of that divorce, Ms. Mayberry and Jake Fuller entered into a marital dissolution agreement. The agreement, in relevant part, specifically awarded Ms. Mayberry all of her Du Pont pension and retirement benefits, as well as her Du Pont stock, thrift plan and SIP plan. In addition to this, the agreement divested Jake Fuller of all rights, title and interest in Ms. Mayberry's property. Yet, as for the plan instruments themselves, which were held by Du Pont, Ms. Mayberry

failed to remove Mr. Fuller's name from the beneficiary designation forms.

On July 17, 1994, forty-one days after her divorce from Jake Fuller, Ms. Mayberry died, and plaintiff Hendon was appointed administrator of the estate. Because Ms. Mayberry died intestate, the plaintiff, as administrator, was obligated to collect all of the assets belonging to Ms. Mayberry and distribute them in accordance with the law.

However, at the time of Ms. Mayberry's death, Du Pont still controlled the decedent's Group Life Insurance Plan, Savings Plan and TRASOP shares. According to plaintiff Hendon, in spite of Du Pont's awareness of Martha Mayberry's divorce from Jake Fuller and plaintiff's objections, Du Pont distributed the benefits under the decedent's plans to Jake Fuller.

The present action ensued.

II. ANALYSIS

The plaintiff contends Du Pont breached its contractual obligation to the decedent by transferring her assets to Jake Fuller, especially in light of Du Pont's awareness of the decedent's divorce from Mr. Fuller. Concerning defendant Fuller, Katherine Hendon asserts he breached the marital dissolution agreement by his subsequent possession and control over those assets. The plaintiff also argues the actions of both defendants constitute conversion.

Du Pont argues, however, the plaintiff's claims should be dismissed. First, according to defendant Du Pont, the case

at bar is governed by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, *et. seq.* Because ERISA requires a plan administrator to discharge its duties in accordance with the documents governing the plan, Du Pont contends one, its actions were not unlawful, and two, the plaintiff has no cause of action against it. Secondly, Du Pont claims that even if ERISA does not preempt state law in this case, its actions were not contrary to Tennessee law. Finally, Du Pont contends the plaintiff's action should be dismissed for failure to exhaust administrative remedies as required by ERISA.

In his motion to dismiss, Jake Fuller adopts Du Pont's arguments.

Each party has presented evidence supporting their respective arguments, and in light of the Court's decision to consider this evidence in the disposition of the matters at hand, the motions to dismiss will be treated as motions for summary judgment. *Fugarino v. Hartford Life and Accident Ins. Co.*, 969 F.2d 178, 182 (6th Cir. 1992).

A. Summary Judgment

Under *Fed R. Civ. P.* 56(c), the Court will render summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The burden is on the moving party to conclusively show that no genuine issue of material fact exists, *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1347 (6th Cir. 1994); *Kentucky Div., Horsemen's Benev. & Prot. Assoc., Inc. v. Turfway Park Racing Assoc., Inc.*, 20 F.3d 1406, 1411 (6th Cir. 1994), and the Court must view the facts

and all inferences drawn therefrom in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Oakland Gin Co., Inc. v. Marlow*, 44 F.3d 426, 429 (6th Cir. 1995); *City Management Corp. v. U.S. Chemical Co., Inc.*, 43 F.3d 244, 250 (6th Cir. 1994).

Once the moving party presents evidence sufficient to support a motion under Rule 56, the nonmoving party is not entitled to a trial merely on the basis of allegations. The nonmoving party may not rest on it pleadings, but must come forward with some significant probative evidence to support its claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Lansing Dairy*, 39 F.3d at 1347; *Horsemen's Benev.*, 20 F.3d at 1411. If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to summary judgment. *Celotex*, 477 U.S. at 323.

The Court determines whether sufficient evidence has been presented to make the issue of fact a proper jury question but does not weigh the evidence, judge the credibility of witnesses, or determine the truth of the matter. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *60 Ivy Street Corp. v. Alexander*, 822 F.2d 1432, 1435-36 (6th Cir. 1987). The standard for summary judgment mirrors the standard for directed verdict. The Court must decide "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52. There must be some probative evidence from which the jury could reasonably find for the nonmoving party. If the Court concludes that a fair-minded jury could not return

a verdict in favor of the nonmoving party based on the evidence presented, it may enter a summary judgment. *Id.; Lansing Dairy*, 39 F.3d at 1347; *Horsemen's Benev.*, 20 F.3d at 1411.

B. ERISA preemption

Section 514(a) of ERISA states federal law shall supersede all state laws that "relate to" an ERISA plan. 29 U.S.C. § 1144(a). A law "relates to" an ERISA plan "'if it has a connection with or reference to such plan.'" *Metropolitan Life Ins. Co. v. Pressley*, 82 F.3d 126, 129 (6th Cir. 1996), *quoting, Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97, 103 S.Ct. 2890, 2900, 77 L.Ed.2d 490 (1983). Furthermore, a state law may "relate to" a benefit plan even if the law is not specifically designed to affect such plans or the effect is only indirect. *Metropolitan* at 129.

In cases where a decedent's former spouse's name has not been removed from a beneficiary designation form under an ERISA plan, and the spouse receives benefits under the plan, in spite of a divorce decree divesting the former spouse of all such interests, the Sixth Circuit has specifically held ERISA governs. *Metropolitan* at 129 (". . . designation of beneficiaries has a connection with or reference to an ERISA plan, preempting state law."); *McMillan v. Parrot*, 913 F.2d 310,3 11 (6th Cir. 1990) ("The designation of beneficiaries plainly relates to these ERISA plans, and we see no reason to apply state law on this issue."). Considering the case at hand is based on just such an issue, this Court finds ERISA controls.

As the defendants indicate, section 404(a)(1)(D) of

ERISA requires that a plan administrator discharge its duties "in accordance with the documents and instruments governing the plan . . . ." 29 U.S.C. § 1104(a)(1)(D). This section clearly mandates that a plan administrator follow plan documents to determine the designated beneficiary. *Metropolitan* at 130.

The plan forms submitted by Du Pont indicate the benefits under the plan were to be distributed according to the relevant beneficiary designation forms, and if the individual listed as the beneficiary on those forms did not survive the employee, the benefits would be distributed according to the plan (Court File No. 3, attachments 1-3). This evidence also demonstrates Jake Fuller is the designated beneficiary under the plan. Thus, the Court finds Du Pont's actions were not unlawful.

The plaintiff argues, however, the language of the marital dissolution agreement constitutes a specific waiver of Jake Fuller's interest in the plans; therefore, even under ERISA, Mr. Fuller is not entitled to the plan benefits. Although there are several decisions from other circuits supporting this reasoning, the Sixth Circuit has rejected the argument. In *Metropolitan*, the Sixth Circuit acknowledged other courts of appeal have held that under federal common law a decedent's ex-spouse may waive his rights as beneficiary of the decedent's insurance plan if a divorce decree specifically divested the spouse of the rights in question. Yet, the *Metropolitan* court stated, "[t]he Sixth Circuit takes a different view and holds that ERISA itself

supplies the rule of law."[1]

III. CONCLUSION

In conclusion, the Court will **GRANT** the defendants' motions to dismiss. The plaintiff's action will be **DISMISSED**.

An Order will enter.

/s/_____
CURTIS L. COLLIER
UNITED STATES DISTRICT JUDGE

---

[1] Unlike the case at bar, the couple's divorce decree in the *Metropolitan* case involved a broad waiver of rights. However, from the language of the *Metropolitan* opinion, this Court believes the Sixth Circuit intended to indicate ERISA governs whether there is a specific **or** a broad waiver of rights in a divorce decree. Thus, in either instance, the plan documents control.

Moreover, there is no allegation that for a situation like the one present in this matter some plan provision other than the beneficiary designation form determined the recipient of benefits.

ENTERED AS A JUDGMENT
AUGUST 13, 1996
By:_____
R. MURRY HAWKINS, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at CHATTANOOGA

KATHERINE M. HENDON, Administrator of the Estate of Martha Mayberry, Deceased, Plaintiff,	) No. 1:95-CV-485
v.	) Judge Curtis L. Collier
E.I. DU PONT DE NEMOURS AND COMPANY and JAKE FULLER, Defendants.	)

ORDER

For the reasons set forth in the accompanying Memorandum, the Court hereby **GRANTS** defendants' motions to dismiss (Court File Nos. 2 and 10). There being no further issues before the Court, this case is **DISMISSED**.

SO ORDERED.

ENTER:

/s/_____
CURTIS L. COLLIER
UNITED STATES DISTRICT JUDGE

Date 8/13/96
Order Book 68 Page 21

APPENDIX C

NOT RECOMMENDED FOR PUBLICATION

No. 96-6233

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
April 13, 1998
LEONARD GREEN, Clerk

KATHERINE M. HENDON, Administrator of the Estate of Martha Mayberry, Plaintiff-Appellant,	) ON APPEAL FROM) THE UNITED) STATES DISTRICT) COURT FOR THE) EASTERN DISTRICT
v.	) OF TENNESSEE
E.I. DUPONT DE NEMOURS AND COMPANY and JAKE FULLER, Defendants-Appellees.	)

BEFORE: NELSON and DAUGHTREY, Circuit Judges, and CARR, District Judge.*

* The Hon. James G. Carr, United States District Judge for the Northern District of Ohio, sitting by designation.

PER CURIAM. The plaintiff, an estate administrator, appeals the district court's grant of summary judgment to two defendants in this action, which was filed in an effort to recover employee benefits paid to the decedent's ex-husband. DuPont had distributed the decedent's employee benefits to her ex-husband, who had not been removed as designated beneficiary, despite a divorce decree divesting him of his rights to the benefits. The administrator of the estate sued both DuPont and the ex-husband in state court for conversion and breach of contract. The defendants removed the case to federal court based on the Employee Retirement Income Security Act. The district court granted summary judgment, ruling that ERISA pre-empted the state law claims and required the plan administrator to follow the beneficiary designation. For the reasons that follow, we find no error and affirm.

PROCEDURAL AND FACTUAL BACKGROUND

Martha Mayberry and Jake Fuller divorced on June 6, 1994, after ten years of marriage. They had negotiated a separation agreement, which divided up their assets and debts. The agreement was adopted by the court and incorporated into the final divorce judgment.

At the time of the divorce, Mayberry had been working at DuPont Chattanooga for more than ten years. The dissolution agreement specifically awarded her all her DuPont employee benefits, and a general waiver provision divested Fuller of all rights, title and interest in her property. The relevant parts of the agreement state:

2. Wife is awarded the following property. . .

> (7) All of her DuPont pension and retirement benefits:
>
> (8) Her DuPont Stock and Thrift Plan and SIP Plan;
>
> ... All right, title and interest HUSBAND has in said property shall be divested out of him and vested solely in wife...
>
> 13. Except as expressly provided in this Agreement, each party shall be fully released by the other from any obligation for alimony, support, maintenance, attorney's fees, court costs, and each party accepts the provisions herein in full satisfaction of all property rights and all obligations for support or otherwise arising out of the marital relationship of the parties. Each party, except with respect to payments accruing hereunder, hereby releases the other party and assigns from any claim of any kind, and specifically relinquishes any right, title or interest in or to any earnings, accumulations, future investments, money or property of the other party. (Emphasis added.)

Martha Mayberry died intestate on July 17, 19941, 41 days after the divorce. At that time, she had acquired DuPont employee benefits worth approximately $169,000, comprised of DuPont Group Life Insurance worth approximately $169,000, comprised of DuPont Group Life Insurance worth approximately $59,000; a DuPont Savings Plan (Thrift or SIP) with a value of approximately $106,000; and TRASOP

shares worth $3,847.

At the time of Mayberry's death, Fuller was the named beneficiary under all the DuPont plans. It appears from the beneficiary designation forms that Mayberry had listed Fuller as her beneficiary soon after they married in 1984. Despite the divorce and dissolution agreement, however, at the time of her death Mayberry had not changed the beneficiary designation for these plans.

Katherine Hendon, who was appointed administrator of Mayberry's estate, provided DuPont with a copy of the divorce decree and marital dissolution agreement prior to distribution of the funds. Notwithstanding the provisions of the marital dissolution agreement, DuPont paid the proceeds of these plans to Jake Fuller, the designated beneficiary.

In November 1995, Hendon, as estate administrator, filed state law claims for breach of contract and conversion against both DuPont and Fuller in state court. The estate contended that the marital dissolution agreement constituted a contractual obligation between Mayberry and Fuller, and that Fuller's acceptance of the benefits was a breach of that contract and also conversion. The estate further contended that DuPont's payment of the benefits to Fuller, in spite of the dissolution agreement, constituted breach of a contract between Mayberry and DuPont and also conversion.

DuPont removed the action to federal court, pursuant to 28 U.S.C. § 1446, based on pre-emption by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq*. DuPont then moved to dismiss the action pursuant to Fed. R. Civ. P. 12(b)(6), contending that (1) employee benefit

plans are governed by ERISA, which preempts the state law claims, and (2) under ERISA the plan documents, including the decedent's beneficiary designation, control the distribution of benefits. Fuller also moved to dismiss on the same grounds.

Because the court considered evidence outside the pleadings, it treated the motion to dismiss as a motion for summary judgment. See Fugarino v. Hartford Life and Accident Ins. Co., 969 F.2d 178, 182 (6th Cir. 1992). The court granted summary judgment for DuPont and Fuller, finding that (1) ERISA pre-empted Hendon's state law claims, and (2) under Sixth Circuit precedent, beneficiary designations are controlling. Because Mayberry's beneficiary forms specifically designated Fuller, and because she had not changed the forms after her divorce, the court held, "DuPont's transfer of the decedent's assets to Jake Fuller was not contrary to the law and, therefore, Jake Fuller is the decedent's beneficiary." Accordingly, the court dismissed Hendon's action.

DISCUSSION

This court reviews *de novo* a district court's grant of summary judgment under Fed. R. Civ. Proc. 56. City of Mt. Clemens v. United States Envtl. Protection Agency, 917 F.2d 908, 914 (6th Cir. 1990). Summary judgment is only appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Fed. R. Civ. Proc. 56(c). In reviewing a summary judgment motion, this court must construe the evidence and all inferences to be drawn from it in the light most favorable to

the nonmoving party. Baseman v. Mead Containers, 779 F.2d 1146, 1150 (6th Cir. 1985). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." Matsushita Elec. Indust. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

ERISA, the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.*, is a comprehensive statute enacted to "protect. . .the interests of participants in employee benefit plans and their beneficiaries." 29 U.S.C. § 1001(b). To secure uniformity in the administration of employee benefit plans, ERISA provides that federal law shall supersede all state laws that "relate to" an ERISA plan. 29 U.S.C. § 1144(a). This pre-emption provision is to be construed broadly: a law "relates to" an ERISA plan "if it has a connection with or reference to such plan." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96-97 (1983); see also McMillan v. Parrott, 913 F.2d 310, 311 (6th Cir. 1990).

Hendon argues that ERISA does not pre-empt her state law claims for breach of contract and conversion because domestic relations is an area of traditional state concern that Congress did not intend to pre-empt when it enacted ERISA. Enforcing a marital dissolution agreement, she contends, is "too tenuous, remote or peripheral" to be pre-empted by ERISA. Shaw, 463 U.S. at 100 n.21.

Yet, although Hendon casts her claim in state law terms, her suit is at bottom a challenge to the beneficiary determination for Mayberry's ERISA-qualified plans, and this court has repeatedly ruled that "the designation of beneficiaries has a connection with or reference to an ERISA

plan, preempting state law." Metropolitan Life Ins. Co. v. Pressley, 82 F.3d 126, 129 (6th Cir. 1996); see also Metropolitan Life Ins. Co. v. Marsh, 119 F.3d 415, 421 (6th Cir. 1997) ("Applying state law to determine the beneficiary under the terms of a state divorce decree would not only relate to a plan, but would [also] interfere with the administration of a plan and violate its terms."); McMillan, 913 F.2d at 311 ("The designation of beneficiaries plainly relates to these ERISA plans, and we see no reason to apply state law on this issue."). The rulings in these cases are directly on point and, indeed, the factual circumstances in McMillan and Pressley are strikingly similar: both involved a divorced spouse who was not removed as beneficiary of an ERISA plan despite a divorce decree divesting the former spouse of such interests.

Faced with the well-settled law of this Circuit, Hendon "requests this court to re-visit and re-examine this pre-emption issue and its holdings in Pressley and McMillan in light of the other authority herein cited and the particular facts of the case." The only case from within this circuit that Hendon cites is Metropolitan Life Ins. Co. v. Pearson, 848 F.Supp. 1326 (E.D. Mich. 1994), a district court opinion that was never appealed to this court and that preceded Marsh. The other authority upon which she relies includes cases from other circuits and inapplicable Supreme Court Cases.[1] Until

---

[1] One such case was overturned by the Supreme Court just last year. In Boggs v. Boggs, 117 S.Ct. 1754, 1760-1 (1997), the Supreme Court reversed the lower courts, holding that ERISA pre-empted application of Louisiana's community property laws in a benefits dispute, despite the fact that "Louisiana's community property laws . . . implement policies and values lying within the traditional domain of the states." Id. at 1761. The Court did not

binding authority is set aside by the Sixth Circuit *en banc* or is called into question by a relevant Supreme Court decision, we are bound to follow the precedents set in prior decisions of this court. Hence, because of our previously articulated rule of pre-emption in cases involving disputed beneficiary designations, we hold that the district court did not err in finding that Hendon's state law claims were pre-empted by ERISA.

Hendon next contends that even if ERISA pre-empts her state law claims, this court should apply federal common law to find that the marital dissolution agreement constituted a waiver of Fuller's interest in the DuPont benefits and, thus, that DuPont improperly paid and Fuller improperly accepted Mayberry's benefits. In contrast, DuPont and Fuller argue that this court should look only to ERISA for the rule for determining beneficiaries, and that under ERISA the decedent's plan designation is controlling.

The parties have properly identified the issue: having concluded that state law is pre-empted, we must determine whether to apply federal common law, or confine our analysis to the ERISA statute itself, in assessing DuPont's beneficiary designation and Fuller's attempted waiver. The inquiry then turns to whether, under that law, Fuller was the appropriate beneficiary.

---

base its pre-emption ruling on the "relate to" language, however, finding instead conflict between the state laws and ERISA. Id. ("We need not inquire whether the statutory phrase 'relate to' provides further and additional support for the pre-emption claim.").

In order to ascertain the applicable law, we "look to either the statutory language or, finding no answer there, to federal common law which, if not clear, may draw guidance from analogous state law." McMillan, 913 F.2d at 311. In contrast to several other circuits, we have uniformly held that ERISA itself supplies the rule of law for determining beneficiaries. McMillan, 913 F.2d at 311; Marsh, 119 F.3d at 420; Pressley, 82 F.3d at 130. This view relies on the ERISA provision requiring a plan administrator to discharge his or her duties "in accordance with the documents and instruments governing the plan." 29 U.S.C. § 1104(a)(1)(D). In McMillan, and again in Pressley and Marsh, we have interpreted this section of the statute as establishing a clear mandate that plan administrators follow plan documents in determining the designated beneficiary. McMillan, 913 F.2d at 311-12; Pressley, 82 F.3d at 130; Marsh, 119 F.3d at 420. In McMillan, we explained:

> ERISA requires that a plan administrator discharge his duties "in accordance with the documents and instruments governing the plan. . . ." 29 U.S.C. § 1104(a)(1)(D). Both [of the decedent's] plans state, "Each Participant shall be given the opportunity in an original election to designate a Beneficiary and from time to time the Participant may file with the Plan Administrator a new or revised designation in such form as the Plan Administrator shall provide." The designation of beneficiary under the plans named Barbara Parrott as Dr. Parrott's beneficiary, and continued to do so, unchanged, for four years after their divorce. This clear statutory

command, together with the plan provisions, answer the question: the documents control, and those name Barbara Parrott.

We believe this resolution fulfills the intent of Congress that ERISA plans be uniform in their interpretation and simple in their application. See H.R. Rep. No. 93-533, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4650. A participant is master of his own ERISA plan. Dr. Parrott agreed to the plans, including the provision concerning the designation and change of beneficiary, kept these documents in his office and did not change the beneficiary in over four years. Simply put, it was Dr. Parrott's designation which controls, not Barbara's intent. Under the plans, we determine his intent by the designation on file at the time of his death.

Such a holding also allows the parties to be certain of their rights and obligations. See Berlin v. Michigan Bell Tel. Co., 858 F.2d 1154, 1162 (6th Cir. 1988). It is for this reason that ERISA plans are to be administered according to their controlling documents. "Rules requiring payment to the named beneficiary yield simple administration, avoid double liability, and ensure that beneficiaries get what's coming to them without the folderol essential under less-certain rules." Fox Valley, 897 F.2d at 283 (Easterbrook, J., dissenting). If the designation on file controls,

> administrators and courts need look no further than the plan documents to determine the beneficiary, thus avoiding expensive litigation as has occurred in the case before us.

Id. at 311-12 (emphasis added).

In addition to asking this court to abandon the McMillan line of cases, Hendon also attempts to distinguish McMillan, relying on a district court opinion decided under similar facts, Czarski v. Bonk, 928 F.Supp. 719 (E.D. Mich. 1996). Unfortunately for Hendon, a panel of this court recently reversed Czarski on this issue. Czarski v. Bonk, No. 96-1444, 1997 WI 535773 (6th Cir. Aug. 27, 1997). In an unpublished opinion, the panel wrote:

> The district court erred . . . by looking to the divorce decree to determine whether Barbara had waived her right to benefits from Edward's ERISA plans. This circuit has clearly and repeatedly held that 29 U.S.C. § 1104(a)(1)(D), which requires a plan administrator to discharge his or her duties "in accordance with the documents and instruments governing plan," together with plan provisions that allow (or require) a plan participant to change the designated beneficiary of the plan, require the administrator to give benefits to the beneficiary named in the plan documents. McMillan, 913 F.2d at 311-12; Pressley, 82 F.3d at 130 (holding that where the plan provided that benefits would be paid to the beneficiary of

> record, and the plan participant had never altered the designation of his ex-wife as the plan beneficiary, the ex-wife was the proper beneficiary); Marsh, [119 F.3d at 420] (reaffirming the rule of McMillan and Pressley). . . . Because Barbara Bonk was listed as the beneficiary on Edward Bonk's ERISA-covered life insurance policies and his 401(k) plan and Edward did not change his designation of beneficiary, she is entitled to those benefits.

Id. at *2-*3.

Finally, Hendon attempts to save the dissolution agreement by noting that its waiver is more specific than the waivers in the other cases this court has considered. She is correct that Jake Fuller's waiver is more explicit than the waiver in McMillan — it specifically names the DuPont employee benefit plans. But even if this court did allow for such waivers, the waiver in this case cannot be effective because it "does not specifically refer to [Fuller's] interest as beneficiary" of an ERISA plan. McMillan, 913 F.2d at 312 (emphasis added). As Fuller argues, "The Marital Dissolution Agreement . . . only addressed benefit assets which at the time of the divorce constituted marital property." Although Fuller may not have realized it at the time of the divorce decree, he had a distinct expectancy or beneficiary interest that he did not specifically waive when he waived "right, title and interest" to the plans. See Lyman Lumber Co. v. Hill, 877 F.2d 692, 693-94 (8th Cir. 1989). ("The decree gave Jeffrey his entire interest in the plan free of any interest of Colleen. It did not, however, specifically refer to

and modify the beneficiary interest.").

In sum, this court is bound by McMillan and its progeny. ERISA requires plan administrators to follow plan documents when determining beneficiaries. In this case there is no dispute that Mayberry named Fuller as her beneficiary and did not change the designation, as she could have, after the divorce. The dissolution agreement, despite containing a fairly explicit waiver of the plan benefits, cannot be given effect. Because the plan documents clearly establish Fuller as beneficiary, he is entitled to the proceeds.[2]

For the reasons set out above, we AFFIRM the judgment of the district court.

---

[2] Hendon urges this court to bind Fuller by the waiver even if it should find that DuPont is not bound by it. She cites many state cases involving life insurance plans. These cases are not on point because they do not involve ERISA-qualified employee benefit plans, and thus do not implicate the very issues in this case. Because we find that under ERISA DuPont acted appropriately in distributing the benefits to Fuller, we cannot find Fuller liable under the marital dissolution agreement for accepting those benefits. Fuller benefits equally from the ERISA pre-emption.

APPENDIX D

FILED
May 22, 1998
LEONARD GREEN, Clerk

96-6233

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KATHERINE M. HENDON, ADMINISTRATOR OF THE ESTATE OF MARTHA MAYBERRY, DECEASED, Plaintiff-Appellant,	)	**ORDER**
v.	)	
E.I. DUPONT DE NEMOURS AND COMPANY, ET AL., Defendants-Appellees.	)	

BEFORE: NELSON and DAUGHTREY, Circuit Judges; and CARR,*

The court having received a petition for rehearing en

* Hon. James G. Carr, United States District Judge for the Northern District of Ohio, sitting by designation.

banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

FILED
SEP 11 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-289

In The

Supreme Court of the United States

October Term, 1997

KATHERINE M. HENDON, Administrator of the Estate of Martha Mayberry, Deceased,

Petitioner,

v.

E.I. DU PONT DE NEMOURS AND COMPANY and JAKE FULLER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Respondent E.I. du Pont de Nemours and Company ("DuPont") has no parent company. There are presently seven publicly held entities in which DuPont, or a subsidiary or affiliated company of DuPont, owns an interest. DuPont Canada, Inc. and DuPont Photomasks, Inc. are subsidiary companies. DNAP Holding Corporation; Hudson Technologies, Inc.; Pioneer Hi-Bred International, Inc.; Shaman Pharmaceuticals, Inc.; Trigon Healthcare, Inc. are companies in which DuPont holds an indirect minority, non-controlling interest.

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STATEMENT OF THE CASE

Martha Mayberry, a DuPont employee, was covered by three ERISA-governed employee benefit plans: (1) a DuPont Group Life Insurance plan; (2) a DuPont Savings Plan; and (3) a TRASOP Stock Plan. [App. 2a-3a]. With respect to each of these plans, DuPont required Ms. Mayberry to designate a beneficiary to receive benefits from the plan in the case of her death. She retained the right to change her beneficiary at any time prior to her death. Ms. Mayberry designated her husband, Jake Fuller.

On June 6, 1994, Ms. Mayberry and Mr. Fuller entered into a marital dissolution agreement which, in relevant part, specifically awarded Ms. Mayberry all of her DuPont pension and retirement benefits, as well as her DuPont Stock and Thrift Plan and SIP Plan. [App. 12a-13a]. In addition to this, the agreement divested Mr. Fuller of all rights, title and interest in Ms. Mayberry's property. [App. 13a]. Yet, as for the plan documents themselves, Ms. Mayberry failed to remove Mr. Fuller as beneficiary, nor did she designate an alternate payee.

Ms. Mayberry died intestate on July 17, 1994, and Petitioner was appointed administrator of the estate. [App. 20a]. After Ms. Mayberry's death, DuPont paid the benefits under these plans to Ms. Mayberry's named beneficiary, Jake Fuller. [App. 20a]. Petitioner alleged that DuPont, notwithstanding the provisions of the divorce decree and marital dissolution agreement, improperly distributed the benefits to Fuller, despite its awareness of Ms. Mayberry's divorce from Fuller and Petitioner's objections. As a result, Petitioner filed state law claims of

breach of contract and conversion against DuPont in the Chancery Court of Hamilton County, Tennessee.

After removing this action to the United States District Court for the Eastern District of Tennessee, DuPont requested the district court dismiss Petitioner's claims with prejudice because (1) the estate's claims are preempted by ERISA; (2) Ms. Mayberry did not change her beneficiary, the divorce agreement at issue did not change Jake Fuller's beneficiary status, and DuPont was thus required to pay the disputed proceeds to the named beneficiary; and (3) Petitioner had failed to exhaust the administrative remedies available to her as required by ERISA. [App. 20a-21a]. Petitioner asserted in her response simply that her state law claims are not preempted by ERISA, and that the language of the marital dissolution agreement constituted a specific waiver of defendant Fuller's interest in the plans.

The district court granted DuPont's motion to dismiss on August 13, 1996. [App. 26a]. It held that Petitioner's cause of action was governed and preempted by ERISA [App. 23a] and that the marriage dissolution agreement did not change Jake Fuller's beneficiary status under the employee benefits plans. [App. 24a]. Petitioner appealed to the United States Court of Appeals for the Sixth Circuit.

On April 13, 1998, the Sixth Circuit affirmed the judgment of the district court, holding that ERISA preempted Petitioner's claims and that the plan documents required by ERISA controlled the designation of

beneficiaries. [App. 40a]. Petitioner has now filed the instant Petition for Writ of Certiorari.

REASONS WHY PETITION SHOULD BE DENIED

I. Petitioner's principal argument is that there is a split of authority among the circuits as to whether the language of ERISA or federal common law applies in resolving whether a divorce decree or the benefit plan documents should govern the disposition of benefits after the death of an employee. In the instant case, the Sixth Circuit, consistent with its prior decisions, found that the unaltered plan documents governed as directed by the provisions of ERISA that require the plan administrator, DuPont, to discharge its duties "in accordance with the documents and instruments governing the plan." 29 U.S.C. § 1104(a)(1)(D). Petitioner attempts to construct its argument of a conflict of authority among the circuits by citation to several other opinions. However, an examination of those cases reveals less than a square conflict of significant proportions to warrant this Court's intervention.

First, it is worthy of note that the instant decision does not expand any difference of approach to this question by the courts of appeals. The Sixth Circuit has been consistent in its position, as Petitioner correctly recognizes. (Pet. 4). The instant unpublished, *per curiam* opinion does not represent any change in the alleged balance of opinions among the circuits that would warrant resolution by this Court.

Second, Petitioner's sweeping assertion of a conflict of opinions does not withstand studied analysis. A deep, abiding division is not as yet clear. For example, unlike the case at bar, several of the opinions cited by Petitioner are factually limited to the distribution of life insurance proceeds. *Mohamed v. Kerr*, 53 F.3d 911, 912 (8th Cir. 1995), *cert. denied*, 516 U.S. 868 (1995); *Brandon v. Travelers Ins. Co.*, 18 F.3d 1321, 1322 (5th Cir. 1994), *cert. denied*, 513 U.S. 1081 (1995); *Metropolitan Life Ins. Co. v. Hanslip*, 939 F.2d 904, 905 (10th Cir. 1991).[1]

Particularly weak is Petitioner's reliance on the Tenth Circuit's decision in *Hanslip* where there was never a mention of life insurance during the divorce proceedings. In fact, citing the Sixth Circuit's decision in *McMillan v. Parrott*, 913 F.2d 310, 312 (6th Cir. 1990), the *Hanslip* court actually enforced the use of the designation of beneficiary in the insurance policy. *Hanslip*, 939 F.2d at 907.

Likewise, the Eighth Circuit's decision in *Mohamed* does not materially advance a strong argument that a conflict exists in need of immediate resolution. In addition to being an insurance controversy, *Mohamed* does not even discuss the duty of the plan administrator under 29 U.S.C. § 1104(a)(1)(D). The parties in that case neither alleged a cause of action under ERISA nor claimed that a particular ERISA section expressly governed the issue. *Mohamed*, 53 F.3d at 913. *Mohamed* does not analyze the

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[1] Even if common law had been applied, the result would likely be no different. Looking to analogous state law for guidance, the Tennessee Supreme Court has upheld beneficiary designation over a divorce decree. *Bowers v. Bowers*, 637 S.W.2d 456 (Tenn. 1982).

applicability of ERISA's anti-alienation provisions which provides that pension plans "shall provide that benefits under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1).

In the final analysis, the instant petition highlights different approaches taken by some of the courts of appeals on the narrow question of the setting of a standard for recognition of beneficiaries to ERISA benefit plans. In light of the very technical and complex nature of this area of law and the need for further analysis of the language of ERISA bearing on this question, we suggest that the Court defer consideration of the question until more of the lower courts have more fully and directly considered the issue.

II. Petitioner cannot set forth any serious split of opinion among the lower courts on whether state causes of action that in effect question the naming of beneficiaries to benefit plans are preempted by ERISA. (Pet. 6). Indeed, the Fifth Circuit, in a case relied upon by Petitioner, found no viable view among the courts contrary to preemption. *Brandon*, 18 F.3d at 1325.

Nevertheless, in a rather desperate attempt to have this Court review this case, Petitioner now argues that the Sixth Circuit failed to follow its own precedent by not granting rehearing on whether the divorce decree was a qualified domestic relations order ("QDRO") under ERISA, 29 U.S.C. § 1056(d)(3). (Pet. 8). The decree in question here did not satisfy the statutory requirements.

In any event, as Petitioner readily admits in her Petition (Pet. 3, 8), this issue was not directly raised or litigated below until she raised the matter before the Sixth Circuit on her petition for rehearing. The Sixth Circuit quite properly discounted such a late theory, and this Court should ignore it as a basis for further review.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 98-289

In The

Supreme Court of the United States

October Term, 1998

KATHERINE M. HENDON, Administrator of the Estate of Martha Mayberry, Deceased,

Petitioner,

v.

E.I. DU PONT DE NEMOURS AND COMPANY and JAKE FULLER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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29 U.S.C. §§1001 *et seq.* 1

29 U.S.C. §1056(d)(3)(B) and (C) 5

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STATEMENT OF THE CASE

Before her death on July 17, 1994, Martha Mayberry (hereinafter, "Mayberry") was an employee of E. I. DuPont de Nemours and Company (hereinafter "DuPont"). [App. 2a-3a] As an employee of DuPont, she participated in three benefit plans governed by the Employee Retirement Income Security Act (hereinafter, "ERISA"), 29 U.S.C. §§1001 *et seq*. The three ERISA benefit plans included DuPont Group Life Insurance Plan, DuPont Savings Plan, and a TRASOP Stock Plan. [App. 21-31]. Under the ERISA Provisions, Ms. Mayberry was required to name a beneficiary who would receive the benefits under the plan in the event of her death. As a plan participant, Ms. Mayberry retained the right to freely change her beneficiary any time prior to her death. Ms. Mayberry designated her husband, Jake Fuller (hereinafter, "Fuller"), a defendant/respondent in this matter.

On June 6, 1994, Ms. Mayberry and Mr. Fuller divorced. The Marital Dissolution Agreement (hereinafter, "MDA") entered between Ms. Mayberry and Mr. Fuller and incorporated into the Final Divorce Decree made division of the marital property. Appropriately, the parties considered and treated the DuPont pension and retirement benefits, as well as the DuPont Stock and Thrift Plan and SIP plan as marital property. Ms. Mayberry was awarded all of her DuPont pension and retirement benefits, her DuPont Stock and Thrift Plan, and SIP Plan. Consequently, the agreement divested Mr. Fuller of all rights, title and interest in Ms. Mayberry's property. [App. 12a-13a]. No provision was included to identify an alternate payee in either the MDA or the Final Decree. Following the divorce Ms. Mayberry did not

remove Mr. Fuller as the designated beneficiary from the plan documents. [App. 20a].

Forty-one days following the divorce, Ms. Mayberry died intestate. The petitioner Hendon, was appointed the administratrix of the estate. [App. 20a].

The defendant DuPont, upon Ms. Mayberry's death, in accordance with the designation of beneficiary form on file, appropriately determined and distributed the plan benefits to the named beneficiary, Mr. Fuller. [App. 24a]. As a result of DuPont distributing the benefits to Mr. Fuller, the Petitioner filed a civil action against Mr. Fuller and DuPont alleging state law claims of breach of contract and conversion. [App. 18a-19a]. This civil action was removed from the Chancery Court of Hamilton County, Tennessee to the United States District Court for the Eastern District of Tennessee. [App. 19a].

Each of the defendants moved to dismiss the action. The District Court treating the motions to dismiss as motions for summary judgment granted the motions and dismissed the civil action against the respondents on August 13, 1996. [App. 26a]. The district court held that the Petitioner's cause of action was governed and preempted by ERISA and the plan documents controlled. [App. 23a-25a]. The court additionally found that the MDA did not change the beneficiary status of Mr. Fuller under the benefits plan. [App. 24a]. Petitioner appealed to the United States Court of Appeals for the Sixth Circuit.

The Sixth Circuit affirmed the decision of the lower court finding no error. [App. 29a, 40a]. The Sixth Circuit held that ERISA preempted the state law claims and

further required the plan administrator to follow the beneficiary designation according to the plan documents. [App. 40a]. Petitioner filed her Petition for Writ of Certiorari.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

The Petitioner is relying heavily on the argument there is a split of authority among the circuits as to whether the language of ERISA or federal common law provides the rule of law to determine whether the plan documents or a properly worded divorce decree should govern the disposition of the plan benefits upon the death of the plan participant. The Petitioner has distanced herself from her original argument that the affect of her state law claims on the employee benefit plans were "too tenuous, remote or peripheral" to warrant that the state law claims "relate to" the plan and thus preempted by ERISA.

The Sixth Circuit has consistently found that ERISA supplies its own rule of law and there is no need to look further than to the language of ERISA. However, the Sixth Circuit recognizes that other courts of appeals have held under federal common law a decedent's ex-spouse may waive his rights as a beneficiary of the decedent's insurance plan; if, the divorce decree specifically divested the spouse of the rights in question.

In *Metropolitan Life Insurance Co. v. Pressley*, 82 F.3d 126 (6th Cir. 1996), the Sixth Circuit acknowledged it took a different view than its sister circuits and held that

ERISA supplies the rule of law. 82 F.3d 126, 130 (6th Cir. 1996). The Sixth Circuit resolved that Congress intended ERISA plans be uniform in their interpretation and simple in their application. *McMillan v. Parrott*, 913 F.2d 310, 312 (6th Cir. 1990). Therefore, the Sixth Circuit has consistently construed ERISA according to its statutory language. See, *Metropolitan Life Insurance Co. v. Pressley*, 82 F.2d 126 (6th Cir. 1996); *Metropolitan Life Insurance Co. v. Marsh*, 119 F.3d 415 (6th Cir. 1997); *McMillan v. Parrott*, 913 F.2d 310 (6th Cir. 1990).

If the statutory language failed to provide guidance, then the court would look to the federal common law for an answer, which if not clear, may then draw guidance from analogous state law. *Id.* at 311, citing *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45, 107 S.Ct. 1549, 1551, 95 L.Ed.2d 39 (1987); *Whitworth Bros. Storage Co. v. Central States SE and SW Pension Fund*, 794 F.2d 221, 234-235 (6th Cir.), *cert. denied*, 479 U.S. 1007, 107 S.Ct. 645, 93 L.Ed.2d 701 (1986). The Sixth Circuit does not find the need to take the analysis a step further by looking to federal common law or analogous state law.

Rather than muddy the waters, the Sixth Circuit strictly follows the language of ERISA and 29 U.S.C. §1104(a)(1)(D) requiring the "plan administrator discharge his duties in accordance with the documents and instruments governing the plan . . . " *McMillan*, at 311; *Marsh*, 119 F.3d at 420; *Pressley*, 82 F.2d at 130. Even if the Sixth Circuit were to find that language of ERISA failed to provide the answer to whether the documents within an ERISA plan controlled, or a Final Divorce Decree controlled, the designation of the beneficiary of ERISA benefits, it would have to look to federal common law.

Finding no clear answer in federal common law the court would then look to the analogous state law. Analogous state law does not support the petitioner's position.

The Supreme Court of Tennessee has had occasion to determine whether the designation of beneficiary documents control or the final divorce decree. The Tennessee Supreme court has held that the designation of beneficiary documents control. *Bower v. Bower*, 637 S.W.2d 456 (Tenn. 1982); *See also, Teachers Insurance & Annuity Association v. Harris*, 709 S.W. 2d 592 (Tenn. 1985); *Matthews v. Lawrence*, 703 S.W. 2d 156 (Tenn. App. 1985).

Respondent DuPont correctly and eloquently discusses that the decisions of the lower courts in this matter does not expand any difference of approach to this question by the court of appeals. The alleged balance among the circuits has not changed, thus the issue does not warrant resolution by this Court. This brief adopts the conclusion of the Respondent DuPont and will not belabor the issue further.

Finally, the Petitioner attempts to raise the issue that the MDA substantially complies with ERISA and thereby qualifies as a qualified domestic relations order (QDRO). First, the petitioner did not raise the issue until she petitioned for rehearing before the Sixth Circuit. The Sixth Circuit did not entertain this issue and this Court should not entertain the issue as a basis for review.

However, even if the issue had been timely raised, the MDA and Final Divorce Decree do not qualify as a QDRO. Under ERISA, 29 U.S.C. §1056(d)(3)(B) and (C), a qualified domestic relations order must create or recognize the existence of an alternate payee's right to, or

assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan. Furthermore, a QDRO is required to clearly specify the name and last known mailing address of the alternate payee to meet the requirements of ERISA. The MDA nor the Final Divorce Decree meet these requirements and does not qualify as a QDRO.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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